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15-4167
Subject
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OGC HAS REVIEWED.

29 May 1953

MEMORANDUM FOR: Assistant Director/Personnel
FROM: Office of General Counsel
SUBJECT: Employment of Retired Officer
REFERENCE: Your Memorandum dated 20 May 1953, same subject

1. The reference requests the advice of this office as to whether the appointment of [redacted] USAF, Retired, will require the obligation of one position authorized under Public Law 53, 82nd Congress, which permits this Agency to employ the services of fifteen (15) retired commissioned officers notwithstanding the statutory prohibition against the holding of dual Federal office. Title 5, United States Code, Section 62. You state that according to information available to your office, [redacted] was retired on 30 June 1949 after 30 years service. OSI proposes to utilize his services as a consultant approximately one day per month.

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2. Title 5, United States Code, Section 62 provides:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specifically authorized thereto by law; but this shall not apply to retired officers of the Army, Navy, Marine Corps, or Coast Guard, whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

3. It is our opinion that the question whether [redacted] would be considered to hold an office "to which compensation is attached" within 25X1A

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the meaning of Section 62 would be determined by the manner in which the compensation for his intermittent service as consultant is paid. If this compensation is in any way computed with reference to a measure of time, as for example, \$50.00 per day, he would be deemed to be holding an office within the meaning of Section 62. This rule has been articulated by repeated decisions of the Comptroller General. See 26 Comp. Gen. 501, 503; 22 Comp. Gen. 312, and decisions cited therein. Whether he is consulted on one day per month or on a full time basis is of no consequence. Accordingly, we would advise that if [REDACTED] is to be compensated with reference to a measure of time, Section 62 of Title 5, United States Code, would preclude his appointment as a consultant in the absence of the obligation of one position under Public Law 53.

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4. An alternative suggests itself which may be adaptable to [REDACTED] situation. The Comptroller General has consistently held that Section 62 would not prohibit appointment where the compensation of the individual rendering consultant services was predicated upon a fee rather than a time basis. See 26 Comp. Gen. 501, 503; 22 Comp. Gen. 312 and decisions cited therein. In accordance with the cited opinions, if it were determined to compensate [REDACTED] by a fixed amount for each consultation, regardless of the length of time required to complete the consultation, he would not be deemed to be appointed to or holding an office to which compensation attached within the meaning of Section 62.

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5. The dissimilarity of result that obtains where compensation is on a fee rather than time basis occurs also in cases involving dual compensation under Section 59a, Title 5, United States Code. See 28 Comp. Gen. 381; 26 Comp. Gen. 501.

6. A formal ruling of the Comptroller General was requested in September of 1951 regarding the application of Section 59a to a retired Naval officer employed on a fee basis as an intermittent consultant with the National Estimates Board. A copy of the unpublished decision of the Comptroller General is attached hereto. It would appear that the considerations noted at the bottom of page 2 and the top of page 3 of this opinion bear upon [REDACTED] case. His position would indeed be stronger in view of the estimated infrequency of need for his services. The quotation from the published decision in 28 Comp. Gen. 381 on page 2 of the attached opinion should be borne in mind as a cautionary guide in arriving at your decision as to the manner in which [REDACTED] appointment will be handled.

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Attachment

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